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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES,
Petitioner,

vs.

THE STATE OF CALIFORNIA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth District

BRIEF FOR THE STATE OF CALIFORNIA

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CALIFORNIA STATE PRINTING OFFICE

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BRIEF FOR THE STATE OF CALIFORNIA

The brief for the United States clearly and concisely states the facts of the case and we have nothing to add to that statement.

ARGUMENT

I

THE STATE OF CALIFORNIA OPERATING THE STATE BELT RAILROAD IN THE MANNER DESCRIBED IN THE STIPULATION OF FACTS IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE

We will concede that whether a transportation agency is a common carrier does not depend upon whether its charter declares it to be a common carrier, but upon what it does. We will likewise concede that the question whether a particular railroad is a common carrier is not affected by the fact that such railroad may be owned and operated by a state. We do maintain, however, that the manner of operation and control, and the functions performed by the State of California in the operation of the State Belt Railroad are not sufficient to constitute that railroad a common carrier engaged in interstate commerce by railroad.

The State of California, in the operation of the State Belt Railroad, has no property other than locomotives and tracks, all located upon property which belongs to the state except as to certain trackage on government property. The state issues no bills of lading, nor does it move any cars on waybills. The state is not a party to any through rate agreement nor to any agreement or contract with shippers or consignees.

In the operation of the State Belt Railroad the state renders a mere switching service charging a flat rate per car for switching without respect to the point of origin or destination of such car, or the weight or quantity of the contents thereof. The switching rate is a little higher for a loaded car, however. The switching rate is paid by the carrier from whom the car is received. The State of California has never assumed nor recognized any of the liabilities or responsibilities of a common carrier.

The service rendered by the State of California in the operation of the State Belt Railroad is identical with the service rendered by the Kentucky and Indiana Bridge Company. In *Kentucky & Indiana Bridge Co.* vs. *Louisville & Nashville Railroad Co.*, 37 Fed. 567, 2 L. R. A. 289, the court, in considering the service rendered by the Kentucky & Indiana Bridge Co. and in concluding that such service did not constitute the bridge company a common carrier engaged in interstate commerce, said at page 615:

> "* * * that petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of section 1 of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection it is only a transfer company or agency *engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the*

shifting of cars, loaded or empty, from one line of connection to another."

The line of demarcation between a common carrier engaged in interstate commerce by railroad and a carrier not so engaged may in many instances be fine. The question whether a carrier is a common carrier engaged in interstate commerce by railroad must be determined in each case by a consideration of the character of services rendered by such carrier and the relation of such services to the transshipment of goods or persons in interstate commerce.

It is claimed by the United States that the services performed by the State Belt Railroad are not substantially different from those performed by the Brooklyn Terminal, and the case of *United States* vs. *Brooklyn Eastern District Terminal,* 249 U. S. 296 is relied upon and quoted from extensively. However, a consideration of the facts of that case discloses that the elements relied upon by this court in reaching the conclusion that the Brooklyn Terminal was a common carrier engaged in interstate commerce are not present in the instant case. The Brooklyn Terminal operated a union freight station under individual contracts with ten interstate railroads and several steamship companies. The terminal received from shippers and loaded upon cars both carload and less than carload outgoing freight. For its services in handling freight the terminal charged at the rate of 3 cents for 100

pounds of freight moving to or from points east of the western termini of the railroads, and 4 1/5 cents on freight moving to or from points beyond such terminals. The terminal issued bills of lading and its docks and warehouses were public freight stations of the railroads. This court, in concluding that the terminal was a common carrier engaged in interstate commerce by railroad, said at page 306:

> "What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations."

Certainly what this court said with reference to the terminal can not be said of the State Belt Railroad. (See stipulation of facts.) Likewise, the cases, *U. S.* vs. *Union Stockyard,* 226 U. S. 286, *U. S.* vs. *Sioux City Stockyards Co.,* 162 Fed. 556, *Union Stockyards Co.* vs. *U. S.,* 169 Fed. 404, *U. S.* vs. *Atlanta Terminal Co.,* 260 Fed. 779, are all distinguishable from the instant case upon their facts, and the elements upon which the courts based their conclusions that the various carriers were common carriers engaged in interstate commerce by railroad are not present in the instant case.

While it is true that in *M'Callum* vs. *U. S.*, 298 Fed. 373, followed in *Tilden* vs. *U. S.*, 21 Fed. (2d) 967, the Circuit Court of Appeals for the Ninth Circuit Court held the State Belt Railroad to be a common carrier engaged in interstate commerce by railroad, the force of those decisions and the consideration due them was destroyed by the fact that, subsequent to those decisions, the Circuit Court of Appeals for the Ninth Circuit certified to this court the question, among others, whether the State Belt Railroad was a common carrier engaged in interstate commerce.

Sherman vs. *United States*, 282 U. S. 25.

While the court declined in the *Sherman* case to pass upon the questions certified to it by the Circuit Court of Appeals, Mr. Justice Holmes, in speaking for the court, stated:

> "California has not gone into business generally as a common carrier, but simply has constructed the Belt line as an incident of its control of the harbor—a State prerogative."

The State of California, in its operation of the State Belt Railroad, is not engaged in the business of a common carrier and is not engaged in the business of handling interstate or any commerce. Its sole activity is the switching of cars at a per car charge in and around its own docks and over its own property in connection with the maintenance and improvement of San Francisco Harbor.

II

THE STATE BELT RAILROAD OWNED AND OPERATED BY THE STATE OF CALIFORNIA IN THE MANNER DESCRIBED IN THE STIPULATION OF FACTS IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT

(a) The operation of the State Belt Railroad is the exercise of a governmental function

The stipulated facts in this case show that the State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived from such operation. The charges for the switching services rendered by the State Belt Railroad are fixed by the Board of Harbor Commissioners pursuant to the authority conferred upon that board by section 2524 of the Political Code of California which authorizes the board to collect such amount of revenue as will enable it to perform the duties required of it by Article IX of said code.

Section 2526 of the Political Code provides:

> "No greater amount of money shall, in the main, ever be collected, by the collection of dockage, wharfage, tolls, rents, and cranage, than shall be necessary to construct and keep in repair such number of wharves, piers, landings, and thoroughfares, construct sheds, dredge such number of slips and docks, construct a sea-wall and harbor embankment, and pay incidental expenses allowed to be paid by this article."

It is apparent from this provision that the State of California is not operating the facilities of San Francisco Harbor in a proprietary capacity. If the State of California were a common carrier engaged in interstate commerce, the fixing and regulation of tolls and charges would be subject to the jurisdiction of the Interstate Commerce Commission, and it is conceivable that that commission might require the collection of tolls and charges which would exceed the amount required for the maintenance and improvement of the harbor, and the Board of Harbor Commissioners would find itself in this anomalous situation: The legislature which created that board has prohibited the collection of a greater amount of money by the board than is necessary to maintain and improve the harbor and the Interstate Commerce Commission, by its order, might require that the board disobey the plain mandate of the California Legislature.

The State Belt Railroad is operated under the immediate supervision of a superintendent who is appointed by and holds office at the pleasure of the Board of Harbor Commissioners and under that board's general supervision and control. All inspectors, engineers and yardmen employed in the operation of the railroad are Civil Service employees except in cases of emergency employment. All superintendents, inspectors, engineers, yardmen and other employees engaged in the operation of the State Belt Railroad are employees and servants

of the State of California. (Transcript, pp. 26 and 27.)

The Supreme Court of California has declared that the operation of the facilities of San Francisco Harbor through the Board of Harbor Commissioners is the exercise of a sovereign function on behalf of the state.

In *Denning* vs. *State,* 123 Cal. 316, the Supreme Court of California said at pages 321 and 322:

> "These provisions of the constitution clearly show that the State has retained control of the harbor and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. * * * But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it; keeping open passageways for the ferry boats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State and connected with the wharves and piers, or used by said board. These duties are of a police character and purely governmental.

"The fact that the board is authorized or required to collect tolls and charges for dockage and warfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' does not affect its character as a governmental agency."

This court, in *Sherman* vs. *United States, supra,* indicated a similar conclusion. It was there said:

"The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the waterfront of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. *But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative."* (Italics ours.)

While it is conceivable that a sovereign state may so maintain and operate a harbor that it *might* be said that such state was doing so in a proprietary

rather than a sovereign capacity, the facts of the instant case preclude any such conclusion. It is of the utmost concern to a state that its ports and harbors be properly managed, controlled and regulated in order to promote the general benefit of the body politic, and when a state manages and controls its ports and harbors with that end in view and not actuated by a desire for profit, the state is acting in its sovereign capacity.

The cases relied upon by the United States, *Helvering* vs. *Powers,* 293 U. S. 214 (operation of a street railway), *South Carolina* vs. *United States,* 199 U. S. 437 (sale of liquor under dispensary system), *Ohio* vs. *Helvering,* 292 U. S. 360 (sale of liquor through state owned stores), are not in point for in each of those cases by no stretch of the imagination could it be said that the particular functions performed by the state were sovereign. Admittedly, in those cases the states were acting in a proprietary capacity and acting in that capacity, in so far as their activities with reference to that particular business were concerned, were amenable to the federal taxing power.

Indeed, this court has recognized that in order to subject a state to the federal taxing power it is necessary that such state be engaged in a private undertaking. In *Georgia* vs. *Chattanooga,* 264 U. S. 472, 481–482, the court characterized the construction of a railroad in Tennessee as a "private undertaking" with respect to which Georgia was

in the same position as a "private corporation authorized to own and operate a railroad," and has "divested itself of its sovereign character." See *United States* vs. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* vs. *Wister,* 2 Pet. 318, 323; *Curran* vs. *Arkansas,* 15 How. 304, 308.

It has been expressly held that the operation and control of port facilities is a sovereign function.

In *Commissioner of Internal Revenue* vs. *Ten Eyck,* 76 Fed. (2d) 515 (C. C. A. 2d Circuit) the Commissioner of Internal Revenue sought to tax under the Revenue Act of 1928 the salary of the respondent, chairman of the Albany Port District Commission. In holding the salary exempt from such taxation the court said, 517, 518,

> "It (the Commission) did operate the railroad, and charged rates authorized by the Interstate Commerce Commission. But we think that this terminal was intended as an instrument of government rather than of commerce only. In providing it and operating it, the state of New York was engaged in a usual governmental function as distinguished from a proprietary function."
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> * * * * *
>
> "Therefore, it is clear that ownership, control, and operation of port facilities are essentially and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States. In England and in Scotland, the right to erect a port was part of the royal prerogative. No port could exist except under the authority of the sovereign. (Citing cases.)

> The governmental character of public wharves, or piers as well as rights in navigable water and landing places, have been recognized by the courts. (Citing cases.)"

It is stated in the brief for petitioner that the state, by undertaking the operation of the railroad has to that extent divested itself of sovereignty, and has to that extent placed itself in the position of private individuals or private corporations engaged in such enterprise. Such statement begs the question for, while it may be that when a sovereign state engages in a private enterprise it divests itself of its sovereignty with respect to such enterprise, certainly the discharge of a purely governmental or sovereign function does not result in divestment of sovereignty. No facts with relation to the operation of the State Belt Railroad are pointed out by the United States which would in any way indicate or lend support to a conclusion that the state was engaged in a private or competitive enterprise as distinguished from a sovereign function.

(b) Congress has no power to impose a penalty on a state when such state is engaged in the discharge of a sovereign function

We have hereinbefore conceded that when a state enters a proprietary field it is with respect to its activities within that field divested of sovereignty and subject to the same limitations and penalties as any private person or corporation. It is, however, well established that the federal government may

not subject a state or its governmental agencies to taxation or regulation provided those agencies are engaged in the discharge of governmental functions, one of the reasons for the rule being that the power to tax is the power to destroy.

McCulloch vs. *Maryland*, 4 Wheat. 316.

If the power to tax is the power to destroy, the power to fine or impose penalty is even a greater power to destroy. If it may be said that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, in the exercise of its governmental functions in facilitating and expediting the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the state from discharging its sovereign functions for the general welfare of the people of California. It means further that a sovereign state may be penalized for the misfeasances of its officers and agents notwithstanding that the state has not voluntarily assumed any liability for such misfeasance, for a state may act only through its officers and agents.

No principle of law is better established than the principle that a sovereign state is not liable for misfeasances, malfeasances or negligence of its officers, agents or servants unless such state has voluntarily assumed such liability. This principle

was announced by this court in *Robinson* vs. *Sichel*, 127 U. S. 507, where the court said, at page 515:

> "The government itself is not responsible for the misfeasances, or wrongs or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

(c) The Federal Safety Appliance Act is not applicable to the State of California since states are not specifically referred to therein

The penalty provided by the Federal Safety Appliance Act is collected from the carrier operating the particular railroad. Section 6 of the Safety Appliance Act, as amended April 1, 1896, U. S. C. Title 45, provides:

> "*Any common carrier* engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such

district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *"
(Italics ours.)

It is well established that a sovereign is not bound by the words of a statute, unless expressly named therein, if the statute tends to restrain or diminish the powers, rights and interests of the sovereign.

In *Savings Bank* vs. *United States,* 86 U. S. 227, 239, the court said:

> "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of parens patriae, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

In *New York* vs. *Irving Trust Company,* 288 U. S. 329, 331, this court, considering section 57(n) of the Bankruptcy Act, said:

"It is admitted here, that as the United States and the states are not mentioned in the limitation of Section 57, they are not bound thereby."

See, also, *United States* vs. *Herron,* 87 U. S. 251; *Guarantee Co.* vs. *Title Guaranty Co.,* 224 U. S. 152; *In re Fowble,* 213 Fed. 676; *Villere* vs. *United States,* 18 Fed. (2d) 409, certiorari denied, 275 U. S. 532.

In the light of the rule announced in these cases, had it been the intent of Congress to make this statute applicable to a sovereign state, it must be assumed that states would have been expressly referred to therein. In other words, had it been the intent of Congress to include within the provisions of the Federal Safety Appliance Act sovereign states discharging governmental functions, it must be presumed that the applicable provisions of the act would have provided, "any common carrier, *including states,* etc."

In *United States* vs. *Clausen,* 291 Fed. 231 (D. C. Washington) transferred to the Supreme Court by the Circuit Court of Appeals (9th Circuit), 293 Fed. 195, writ of error dismissed, 266 U. S. 641, the District Court held that the "Trading with the Enemy Act" giving the District Courts jurisdiction over proceedings under that act and defining "person" as including a "body politic" did not operate to give the District Court jurisdiction over a suit against the state, and speaking of the question the court said, at pages 237 and 238:

"Unless the words 'body politic,' occurring in the last-quoted section, were meant to include a state of the Union, as well as a municipality, there would, without question, be no authority for these proceedings. It has been held that the words 'body politic,' used in certain statutes, include a state. *Ervin* v. *State,* 150 Ind. 332, 48 N. E. 249, at 251. In holding that the United States could make a contract not previously directed by statute, Marshall, as Circuit Justice, held (*U. S.* v. *Maurice,* Fed. Cas. No. 15, 747):

'The United States is a government and consequently, a body politic and corporate, capable of obtaining the objects for which it was created. by the means which are necessary for the attainment.'

"It is well understood that this is a possessory suit, a seizure or capture on land, and that, as provided in the act, the rights of all interested are to be determined after the surrender of possession. Under its war powers, Congress doubtless could confer upon a District Court authority to coerce a sovereign state and its officers, but that it so intended is not lightly to be concluded in the absence of positive and express congressional enactment, particularly so in view of the provisions of section 233 of the Judicial Code (section 1210, Comp. Stats.), which provides:

'The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.'

"This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a sovereign state form no small part of the reason that has actuated the law-making powers in making a state subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a state, is not to be sanctioned, in view of the long-established recognition of this principle in the history of the doctrine of state's rights."

The term "body politic" would more nearly evince an intention on the part of Congress to include a sovereign state than the term "common carrier." It should not lightly be held that it was the intent of Congress by the use of the term "common carrier" to strip a sovereign state of the dignity to which such state is entitled.

III

THE DISTRICT COURT HAD NO JURISDICTION OF THIS ACTION AGAINST THE STATE OF CALIFORNIA

The venue of any action against the State of California brought by the United States must be in the Supreme Court of the United States.

Constitution of the United States, Article III, Sec. 2;

State of Rhode Island vs. *The State of Massachusetts,* 12 Peters 657;
United States of America vs. *The State of Texas,* 143 U. S. 621.

We will concede the power of congress to invest inferior federal courts with jurisdiction over suits to which states are parties.

Ames vs. *Kansas,* 111 U. S. 449.

However, in light of the provisions of section 233 of the Judicial Code passed to give effect to the provisions of Article III, section 2, of the United States Constitution, providing that the Supreme Court shall have exclusive original jurisdiction over all controversies of a civil nature where a state is a party, it must follow that had congress intended to include within the provisions of the Safety Appliance Act a sovereign state, such state would have expressly been mentioned. Any argument to the effect that congress invested the district courts with jurisdiction in suits against a sovereign state for violations of the Federal Safety Appliance Act must rest upon the theory that the provisions of that act repeal by implication the provisions of section 233 of the Judicial Code.

The doctrine of supersession or repeal by implication is not favored by the courts. In *Great Northern Railway Co.* vs. *United States* (C. C. A. 8) 155, Fed. 945, affirmed 208 U. S. 452, Mr. Justice Van Devanter, then a member of the United States Circuit Court, said:

"* * * to establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. (Many cases cited) Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation."

See also *Gay* vs. *Ruff*, 292 U. S. 25, 37; and *Knapp* vs. *Byram*, 21 Fed. (2d) 226, 227.

The reasons underlying the rule that repeals by implication are not to be favored are even more apparent when the doctrine of implied repeal is invoked against a state (*United States* vs. *Clausen*, *supra*). See also *United States* vs. *McIntosh*, 57 Fed. (2d) 573.

CONCLUSION

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the
State of California.

RALPH O. MARRON,
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